Supreme Court, U.S.
FILED

'98 923 DEC 4 1998

No. OFFICE

In The

Supreme Court of the United States

October Term, 1998

BANQUE PARIBAS LONDON, PARIBAS GLOBAL BOND FUTURES FUND, PARIBAS ASSET MANAGEMENT LTD. and JOHN ARIDA,

Cross-Petitioners,

vs.

EUROPE AND OVERSEAS COMMODITY TRADERS S.A.,

Cross-Respondent.

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

J. PORTIS HICKS
Counsel of Record
FREDERICK A. BRODIE
TAKEMI UENO
WINTHROP, STIMSON,
PUTNAM & ROBERTS
One Battery Park Plaza
New York, New York 10004-1490
(212) 858-1000

Attorneys for Cross-Petitioners

149897

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether, if this Court grants Petitioner's application for a writ of certiorari to review the issue of whether subject matter jurisdiction should be asserted over Petitioner's securities law claims, this Court should also address whether those claims were properly dismissed by the district court on the ground of *forum non conveniens*.

STATEMENT PURSUANT TO RULE 29.6

Cross-Petitioner Banque Paribas (sued herein as Banque Paribas London), which changed its name to Paribas on May 12, 1998, is a French bank. It is wholly owned by Compagnie Financière de Paribas, whose shares are publicly traded. Paribas owns interests in a number of wholly owned and nonwholly owned subsidiaries, none of which are publicly traded.

Cross-Petitioner Paribas Asset Management Ltd. is a Bahamian corporation which is indirectly wholly owned by respondent Paribas. It has no nonwholly owned subsidiaries.

Cross-Petitioner Paribas Global Bond Futures Fund is a Luxembourg mixed capital company, units in which are publicly traded on the Luxembourg stock exchange. It has no nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Statement of the Case	2
Reason for Granting the Writ	5
I. *Forum Non Conveniens* Should Be Preserved As A Ground For Affirmance By This Court	5
Conclusion	7

TABLE OF CITED AUTHORITIES

Page

Cases:

American Dredging Co. v. Miller, 510 U.S. 443 (1994) 6

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 5

Gulf Oil v. Gilbert, 330 U.S. 501 (1947) 4

Peoria & Pekin Union Railway Co. v. United States, 263 U.S. 528 (1924) 6

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) ... 6

United States v. American Railway Express Co., 265 U.S. 425 (1924) 6

Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979) 5

Statute:

28 U.S.C. § 1254(1) 1

Rule:

Supreme Court Rule 12.5 1

Other Authority:

Robert L. Stern *et al., Supreme Court Practice* 364-65 (7th ed. 1993) 6

Paribas (sued herein as Banque Paribas London), Paribas Global Bond Futures Fund (the "Fund"), Paribas Asset Management Ltd. ("PAM"), and John Arida ("Mr. Arida") cross-petition this Court for a writ of certiorari, if the Court grants the Petition of Europe and Overseas Commodity Traders, S.A. ("EOC" or "Petitioner") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (P. App. 1a-29a) is reported at 147 F.3d 118 (2d Cir. 1998). The opinion of the United States District Court for the Southern District of New York (P. App. 30a-54a) is reported at 940 F. Supp. 528 (S.D.N.Y. 1996).

STATEMENT OF JURISDICTION

The court of appeals issued its decision and judgment on June 4, 1998. EOC filed a petition for a writ of certiorari on October 30, 1998, and the petition was placed on the Court's docket on November 4, 1998.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court of the United States. This cross-petition is conditioned upon this Court's grant of Petitioner's petition for a writ of certiorari.

---

1. EOC's Petition for a Writ of Certiorari will be cited herein as "Pet." The Appendix to EOC's Petition for a Writ of Certiorari will be cited as "P. App." Portions of the record below cited herein, if not appended to EOC's Petition for Certiorari, are appended hereto and cited as "Cross-P. App." Emphasis in passages quoted herein is ours unless otherwise indicated.

STATEMENT OF THE CASE

In October 1992, EOC entered into a non-discretionary investment agreement (the "Investment Agreement") with the London branch office of Paribas and opened an investment account with Paribas (the "London Investment Account"). P. App. 2a, 5a; Cross-P. App. 1a-39a. The Investment Agreement, executed over a year before the investments at issue here were made, states that EOC's country of incorporation is Panama and that its corporate registration address is in Panama. P. App. 5a; Cross-P. App. 35a. EOC's address for correspondence, its principal place of business, the place where its directors' meetings are held, and the place where its shareholders' meetings are held, are all located in the Principality of Monaco. P. App. 5a, 32a & n.3; Cross-P. App. 35a, 37a.

The Investment Agreement states:

> This Agreement is governed by English Law. Disputes arising out of this Agreement shall be subject to the jurisdiction of the English courts to which for [Paribas'] benefit [EOC] submit[s].

Cross-P. App. 22a. In the Investment Agreement, EOC named an agent for service of process in England. P. App. 5a; Cross-P. App. 38a.

In October 1993, EOC began purchasing units of the Fund, a Luxembourg entity. P. App. 5a, 32a. EOC made its initial purchase of Fund units from its London Investment Account after a discussion in England between EOC's shareholder Alan Carr (a Canadian citizen) and Mr. Arida (a U.K. national employed in Paribas' London office). Pet. 3-5; P. App. 2a, 33a-35a, 41a. Later purchases were made by EOC from its London

Investment Account pursuant to orders placed by Mr. Carr on behalf of EOC while Mr. Carr was vacationing in the United States. P. App. 7a, 20a n.12, 41a-42a. During the period October through November 1993, EOC used funds from its London Investment Account to purchase approximately $1,788,800 worth of Fund units. P. App. 33a, 36a, 39a, 41a-42a, 51a.

After the Fund's units decreased in value, EOC brought this action against Paribas, the Fund, Mr. Arida individually, and PAM (a Bahamian corporation that manages the Fund, P. App. 2a), asserting claims under the federal securities laws, Florida Blue Sky laws, and Florida common law. Cross-Petitioners moved to dismiss the complaint for lack of subject matter jurisdiction, lack of personal jurisdiction over the Fund, Mr. Arida and PAM, and *forum non conveniens*.[2] In support of their *forum non conveniens* motion, Cross-Petitioners submitted (among other things) an uncontroverted, sworn declaration from an English lawyer experienced in the commercial and business law of England that England would be an adequate alternative forum, offering adequate remedies to Petitioner. Cross-P. App. 40a-55a.

The district court issued a memorandum decision dismissing EOC's complaint on June 19, 1996, which was amended in minor respects on June 28, 1996. Pet. App. 30a-31a. The district court held that: (i) it lacked subject matter jurisdiction of plaintiff's securities law claims; (ii) it lacked personal jurisdiction over the Fund, PAM, and Mr. Arida; and (iii) even if it had jurisdiction, the complaint should be dismissed as to any defendants over whom it could exercise personal jurisdiction on the ground of *forum non conveniens*. P. App. 37a-53a.

---

2. The district court directed Cross-Petitioners not to move for dismissal on the ground of failure to state a claim. P. App. 3a.

In ruling on *forum non conveniens*, the district court carefully considered the factors set forth in *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947). It found that:

- England is an adequate forum for EOC's claims, P. App. 45a-46a;

- New York is an inconvenient forum, P. App. 47a;

- all the identified witnesses (with the possible exception of Mr. Carr) reside overseas, and it would be extremely inconvenient and prohibitively expensive to transport them to the United States, P. App. 48a-49a;

- five of Cross-Petitioners' witnesses cannot be compelled to testify in the United States, P. App. 48a;

- the dispute between the parties arises out of the Investment Agreement, and is therefore governed by English law and should be heard in an English forum, P. App. 49a-50a, 52a;

- English courts have a greater interest than U.S. courts in adjudicating this case, because "[t]he United Kingdom has a substantial interest in determining whether a British citizen who was employed by the London office of a French bank fraudulently induced the purchase of securities in London," P. App. 51a-52a;

- "this case has little to do with New York or any other jurisdiction in the United States, except for the fortuitous presence of plaintiff's shareholder in Florida at the time of some of the purchases underlying this action," P. App. 51a;

- New York jurors should not be burdened with hearing this case, P. App. 52a; and

- as a forum, New York "is inconvenient to [Cross-Petitioners] out of all proportion to the convenience to the [Petitioner]," P. App. 52a.

EOC appealed. The United States Court of Appeals for the Second Circuit affirmed the district court on June 4, 1998, holding that the district court had properly found that it lacked subject matter jurisdiction. Pet. App. 29a. The court of appeals did not reach the *forum non conveniens* issue.

REASON FOR GRANTING THE WRIT

If this Court grants EOC's petition for a writ of certiorari, Cross-Petitioners might be deemed (absent this cross-petition) to have waived their *forum non conveniens* argument. Cross-Petitioners have filed this cross-petition to preserve their rights to have this case dismissed based on the ground of *forum non conveniens*.

I.

FORUM NON CONVENIENS SHOULD BE PRESERVED AS A GROUND FOR AFFIRMANCE BY THIS COURT

Generally, a respondent in this Court may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the district court or the court of appeals." *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *see also, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 n.7 (1984) ("Respondents . . . may rely on any ground that

finds support in the record."); *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924) ("it is . . . settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve . . . an insistence upon matter overlooked or ignored by [the lower court]").

However, issues relating to venue may fall outside this general rule. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 525 (1974) (Douglas, J., dissenting) (respondent has right to urge any argument, "save possibly questions of venue," to support judgment in its favor).[3] In one of the cases cited by Justice Douglas, *Peoria & Pekin Union Railway Co. v. United States*, 263 U.S. 528 (1924), the Court found that the United States had waived the defense of improper venue because, after losing below on the issue of venue, it had failed to cross-appeal. *Id.* at 535-36. The other case cited by Justice Douglas, *American Railway Express*, stated (while discussing *Peoria*): "An objection to venue can be waived at any stage of the proceeding. This Court held that it was waived by failure to take a cross-appeal." 265 U.S. at 436 n.11. *See also* Robert L. Stern *et al.*, *Supreme Court Practice* 364-65 (7th ed. 1993).

Although the instant case involves *forum non conveniens* rather than venue, the doctrine of *forum non conveniens* is viewed as one of venue. *See, e.g., American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994) ("At bottom, the doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision . . ."; it is, so to speak, a "federal common-law venue rule"). Because the *Peoria* line of cases relating to the waivability of venue might apply to *forum non conveniens*, Cross-Petitioners have filed this conditional cross-petition for certiorari in order to preserve the issue for consideration by

---

3. The majority in *Scherk* did not address this issue.

this Court. Judicial economy will be served if all grounds for dismissal raised below are preserved for consideration by this Court. It would unfairly prejudice Cross-Petitioners to have a substantial ground for dismissal excluded from consideration on the basis of waiver. Further, even if this Court does not reach the issue of *forum non conveniens*, it would be dispositive on remand, provided it is not waived.

CONCLUSION

For the reasons set forth above, if the Court grants EOC's petition for a writ of certiorari, it should also grant this conditional cross-petition for a writ of certiorari.

Respectfully submitted,

J. PORTIS HICKS
Counsel of Record
FREDERICK A. BRODIE
TAKEMI UENO
WINTHROP, STIMSON,
PUTNAM & ROBERTS
One Battery Park Plaza
New York, New York 10004-1490
(212) 858-1000

Attorneys for Cross-Petitioners

December 4, 1998